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INC.

14 IN THE UNITED STATES DISTRICT COURT  
15 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
16 OAKLAND DIVISION

17 FINJAN, INC., a Delaware Corporation,  
18 Plaintiff,

19 v.

20 BITDEFENDER INC., a Florida Corporation,  
21 and BITDEFENDER S.R.L., a Romanian  
22 Corporation,

23 Defendants.

Case No.: 4:17-cv-4790-HSG

~~PROPOSED~~ PROTECTIVE ORDER,  
FILED PURSUANT TO THE COURT'S  
DISCOVERY ORDER ENTERED AT  
DKT. NO. 65

DEMAND FOR JURY TRIAL

1. PURPOSES AND LIMITATIONS

Disclosure and discovery activity in this action are likely to involve production of confidential, proprietary, or private information for which special protection from public disclosure and from use for any purpose other than prosecuting this litigation may be warranted. Accordingly, the parties hereby petition the Court to enter the following Protective Order, pursuant to the Discovery Order (Dkt. No. 65) concerning the parties' dispute over the terms of this Order. The parties acknowledge that this Order does not confer blanket protections on all disclosures or responses to discovery and that the protection it affords from public disclosure and use extends only to the limited information or items that are entitled to confidential treatment under the applicable legal principles. The parties further acknowledge, as set forth in Section 14.4 below, that this Protective Order does not entitle them to file confidential information under seal; Civil Local Rule 79-5 sets forth the procedures that must be followed and the standards that will be applied when a party seeks permission from the Court to file material under seal.

2. DEFINITIONS

2.1 Challenging Party: a Party or Non-Party that challenges the designation of information or items under this Order.

2.2 "CONFIDENTIAL" Information or Items: information (regardless of how it is generated, stored or maintained) or tangible things that qualify for protection under Federal Rule of Civil Procedure 26(c).

2.3 Counsel (without qualifier): Outside Counsel of Record and House Counsel (as well as their support staff).

2.4 Designating Party: a Party or Non-Party that designates information or items that it produces in disclosures or in responses to discovery as "CONFIDENTIAL," "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY – SOURCE CODE."

2.5 Disclosure or Discovery Material: all items or information, regardless of the medium or manner in which it is generated, stored, or maintained (including, among other things,

1 testimony, transcripts, and tangible things), that are produced or generated in disclosures or  
2 responses to discovery in this matter.

3       2.6     Expert: a person with specialized knowledge or experience in a matter pertinent to  
4 the litigation who (1) has been retained by a Party or its counsel to serve as an expert witness or  
5 as a consultant in this action, (2) is not a past or current employee of a Party or of a Party's  
6 competitor, and (3) at the time of retention, is not anticipated to become an employee of a Party  
7 or of a Party's competitor.

8       2.7     "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" Information or  
9 Items: extremely sensitive "Confidential Information or Items," disclosure of which to another  
10 Party or Non-Party would create a substantial risk of serious harm that could not be avoided by  
11 less restrictive means.

12       2.8     "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY – SOURCE CODE"  
13 Information or Items: extremely sensitive "Confidential Information or Items" representing  
14 computer code and associated comments and revision histories, formulas, engineering  
15 specifications, or schematics that define or otherwise describe in detail the algorithms or structure  
16 of software or hardware designs, disclosure of which to another Party or Non-Party would create  
17 a substantial risk of serious harm that could not be avoided by less restrictive means.

18       2.9     House Counsel: attorneys who are employees of a Party to this action or Andrei  
19 Popovici, counsel for Bitdefender who is not an employee of Bitdefender. House Counsel does  
20 not include Outside Counsel of Record or any other outside counsel aside from Andrei Popovici.

21       2.10    Non-Party: any natural person, partnership, corporation, association, or other legal  
22 entity not named as a Party to this action.

23       2.11    Outside Counsel of Record: attorneys who are not employees of a Party to this  
24 action but are retained to represent or advise a Party to this action and have appeared in this  
25 action on behalf of that Party or are affiliated with a law firm which has appeared on behalf of  
26 that Party.

27       2.12    Party: any party to this action, including all of its officers, directors, employees,  
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consultants, retained experts, House Counsel and Outside Counsel of Record (and their support staffs).

2.13 Producing Party: a Party or Non-Party that produces Disclosure or Discovery Material in this action.

2.14 Professional Vendors: persons or entities other than employees of a Party to this action that provide litigation support services (e.g., photocopying, videotaping, translating, preparing exhibits or demonstrations, and reviewing, categorizing, organizing, storing, or retrieving data in any form or medium) and their employees and subcontractors.

2.15 Protected Material: any Disclosure or Discovery Material that is designated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY – SOURCE CODE.”

2.16 Receiving Party: a Party that receives Disclosure or Discovery Material from a Producing Party.

### 3. SCOPE

3.1 The protections conferred by this Stipulation and Order cover not only Protected Material (as defined above), but also (1) any information copied or extracted from Protected Material; (2) all copies, excerpts, summaries, or compilations of Protected Material; and (3) any testimony, conversations, or presentations by Parties or their Counsel that might reveal Protected Material. However, the protections conferred by this Stipulation and Order do not cover the following information: (a) any information that is in the public domain at the time of disclosure to a Receiving Party; (b) any information that becomes part of the public domain after its disclosure to a Receiving Party, as a result of publication not involving a violation of this Order, including becoming part of the public record through trial or otherwise; (c) any information known to the Receiving Party prior to the disclosure; and (d) any information obtained by the Receiving Party after the disclosure from a source who obtained the information lawfully and under no obligation of confidentiality to the Designating Party. Any use of Protected Material at trial shall be governed by a separate agreement or order.

1       4.     DURATION

2           4.1     Even after final disposition of this litigation, the confidentiality obligations  
3 imposed by this Order shall remain in effect until a Designating Party agrees otherwise in writing  
4 or a court order otherwise directs. Final disposition shall be deemed to be the later of (1)  
5 dismissal of all claims and defenses in this action, with or without prejudice; and (2) final  
6 judgment herein after the completion and exhaustion of all appeals, rehearings, remands, trials, or  
7 reviews of this action, including the time limits for filing any motions or applications for  
8 extension of time pursuant to applicable law.

9       5.     DESIGNATING PROTECTED MATERIAL

10          5.1     Exercise of Restraint and Care in Designating Material for Protection. Each Party  
11 or Non-Party that designates information or items for protection under this Order must take care  
12 to limit any such designation to specific material that qualifies under the appropriate standards.  
13 To the extent it is practical to do so, the Designating Party must designate for protection only  
14 those parts of material, documents, items, or oral or written communications that qualify – so that  
15 other portions of the material, documents, items, or communications for which protection is not  
16 warranted are not swept unjustifiably within the ambit of this Order.

17           Mass, indiscriminate, or routinized designations are prohibited. Designations that are  
18 shown to be clearly unjustified or that have been made for an improper purpose (e.g., to  
19 unnecessarily encumber or retard the case development process or to impose unnecessary  
20 expenses and burdens on other parties) expose the Designating Party to sanctions.

21           If it comes to a Designating Party's attention that information or items that it designated  
22 for protection do not qualify for protection at all or do not qualify for the level of protection  
23 initially asserted, that Designating Party must promptly notify all other Parties that it is  
24 withdrawing the mistaken designation.

25          5.2     Manner and Timing of Designations. Except as otherwise provided in this Order  
26 (see, e.g., second paragraph of Section 5.2(a) below), or as otherwise stipulated or ordered,  
27 Disclosure or Discovery Material that qualifies for protection under this Order must be clearly so  
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1 designated before the material is disclosed or produced. Designation in conformity with this  
2 Order requires:

3 (a) for information in documentary form (e.g., paper or electronic documents, but  
4 excluding transcripts of depositions or other pretrial or trial proceedings), that the Producing  
5 Party affix the legend “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’  
6 EYES ONLY,” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY – SOURCE  
7 CODE” to each page of a document or portion of a document that contains Protected Material.

8 A Party or Non-Party that makes original documents or materials available for inspection  
9 need not designate them for protection until after the inspecting Party has indicated which  
10 material it would like copied and produced. During the inspection and before the designation, all  
11 of the material made available for inspection shall be deemed “HIGHLY CONFIDENTIAL –  
12 ATTORNEYS’ EYES ONLY,” or if the material is Source Code, “HIGHLY CONFIDENTIAL –  
13 ATTORNEYS’ EYES ONLY – SOURCE CODE.” After the inspecting Party has identified the  
14 documents it wants copied and produced, the Producing Party must determine which documents,  
15 or portions thereof, qualify for protection under this Order. Then, before producing the specified  
16 documents, the Producing Party must affix the appropriate legend (“CONFIDENTIAL,”  
17 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL  
18 – ATTORNEYS’ EYES ONLY – SOURCE CODE”) to each page of a document or portion of a  
19 document that contains Protected Material.

20 (b) for testimony given in deposition or in other pretrial or trial proceedings, that the  
21 Designating Party identify on the record, before the close of the deposition, hearing, or other  
22 proceeding, or within 21 days thereafter in a written notice to the other Party, all protected  
23 testimony and specify the level of protection being asserted. Only those portions of the testimony  
24 that are appropriately designated for protection within the 21 days shall be covered by the  
25 provisions of this Protective Order. Alternatively, a Designating Party may specify, at the  
26 deposition, hearing or other proceeding, or up to 21 days afterwards in writing, that the entire  
27 transcript shall be treated as “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL –  
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1 ATTORNEYS' EYES ONLY.”

2 During a deposition, when counsel deems that the answer to a question may result in the  
3 disclosure of Protected Material of that counsel's client, counsel may request that any persons  
4 present who are not authorized pursuant to Section 7 leave the deposition during the confidential  
5 portion of the deposition. The use of a document as an exhibit at a deposition shall not in any  
6 way affect its designation as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL –  
7 ATTORNEYS' EYES ONLY,” or “HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY  
8 – SOURCE CODE.”

9 Transcripts containing Protected Material shall have an obvious legend on the title page  
10 that the transcript contains Protected Material, and the title page shall be followed by a list of all  
11 pages (including line numbers as appropriate) that have been designated as Protected Material and  
12 the level of protection being asserted by the Designating Party. The Designating Party shall  
13 inform the court reporter of these requirements. Any transcript that is prepared before the  
14 expiration of the 21-day period for designation shall be treated during that period as if it had been  
15 designated “HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY” in its entirety unless  
16 otherwise agreed. After the expiration of that period, the transcript shall be treated only as  
17 actually designated.

18 (c) for information produced in some form other than documentary and for any other  
19 tangible items, that the Producing Party affix in a prominent place on the exterior of the container  
20 or containers in which the information or item is stored the legend “CONFIDENTIAL,”  
21 “HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY,” or “HIGHLY CONFIDENTIAL  
22 – ATTORNEYS' EYES ONLY – SOURCE CODE.” If only a portion or portions of the  
23 information or item warrant protection, the Producing Party, to the extent practicable, shall  
24 identify the protected portion(s) and specify the level of protection being asserted.

25 5.3 Inadvertent Failures to Designate. An inadvertent failure to designate qualified  
26 information or items does not, standing alone, waive the Designating Party's right to secure  
27 protection under this Order for such material. Upon correction of a designation, the Receiving  
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1 Party must make reasonable efforts to assure that the material is treated in accordance with the  
2 provisions of this Order. If at the time of such correction, the Receiving Party has already  
3 disclosed the Protected Material in a manner inconsistent with the corrected designation, the  
4 Receiving Party shall comply with the procedures set forth at Section 12.

5 6. CHALLENGING CONFIDENTIALITY DESIGNATIONS

6 6.1 Timing of Challenges. Any Party or Non-Party may challenge a designation of  
7 confidentiality at any time, except as specified in Section 6.3, below. Unless a prompt challenge  
8 to a Designating Party's confidentiality designation is necessary to avoid foreseeable, substantial  
9 unfairness, unnecessary economic burdens, or a significant disruption or delay of the litigation, a  
10 Party does not waive its right to challenge a confidentiality designation by electing not to mount a  
11 challenge promptly after the original designation is disclosed.

12 6.2 Meet and Confer. The Challenging Party shall initiate the dispute resolution  
13 process by providing written notice of each designation it is challenging and describing the basis  
14 for each challenge. To avoid ambiguity as to whether a challenge has been made, the written  
15 notice must recite that the challenge to confidentiality is being made in accordance with this  
16 specific paragraph of the Protective Order. The parties shall attempt to resolve each challenge in  
17 good faith and must begin the process by conferring directly (in voice to voice dialogue; other  
18 forms of communication are not sufficient) within 7 days of the date of service of notice. In  
19 conferring, the Challenging Party must explain the basis for its belief that the confidentiality  
20 designation was not proper and must give the Designating Party an opportunity to review the  
21 designated material, to reconsider the circumstances, and, if no change in designation is offered,  
22 to explain the basis for the chosen designation. A Challenging Party may proceed to the next  
23 stage of the challenge process only if it has engaged in this meet and confer process first or  
24 establishes that the Designating Party is unwilling to participate in the meet and confer process in  
25 a timely manner.

26 6.3 Judicial Intervention. If the Parties cannot resolve a challenge without court  
27 intervention, the Challenging Party shall file and serve a motion to change the confidentiality  
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1 designation under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if  
2 applicable) within 14 days of the initial notice of challenge or within 7 days of the parties  
3 agreeing that the meet and confer process will not resolve their dispute, whichever is earlier.  
4 Each such motion must be accompanied by a competent declaration affirming that the movant has  
5 complied with the meet and confer requirements imposed in the preceding paragraph. Failure by  
6 the Challenging Party to make such a motion including the required declaration within 14 days  
7 (or 7 days, if applicable) shall automatically waive the confidentiality challenge for each  
8 challenged designation. Any motion brought pursuant to this provision must be accompanied by a  
9 competent declaration affirming that the movant has complied with the meet and confer  
10 requirements imposed by the preceding paragraph.

11 The burden of persuasion in any such challenge proceeding shall be on the Designating  
12 Party. Frivolous challenges and those made for an improper purpose (e.g., to harass or impose  
13 unnecessary expenses and burdens on other parties) may expose the Challenging Party to  
14 sanctions. All parties shall continue to afford the material in question the level of protection to  
15 which it is entitled under the Producing Party's designation until the Court rules on the challenge.

16 7. ACCESS TO AND USE OF PROTECTED MATERIAL

17 7.1 Basic Principles. A Receiving Party may use Protected Material that is disclosed  
18 or produced by another Party or by a Non-Party in connection with this case only for prosecuting,  
19 defending, or attempting to settle this litigation. Such Protected Material may be disclosed only  
20 to the categories of persons and under the conditions described in this Order. When the litigation  
21 has been terminated, a Receiving Party must comply with the provisions of Section 14.4 below  
22 (FINAL DISPOSITION).

23 Protected Material must be stored and maintained by a Receiving Party at a location and  
24 in a secure manner that ensures that access is limited to the persons authorized under this Order.

25 7.2 Disclosure of "CONFIDENTIAL" Information or Items. Unless otherwise  
26 ordered by the Court or permitted in writing by the Designating Party, a Receiving Party may  
27 disclose any information or item designated "CONFIDENTIAL" only to:  
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1 (a) the Receiving Party's Outside Counsel of Record in this action, as well as  
2 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the  
3 information for this litigation;

4 (b) the officers, directors, employees, and House Counsel of the Receiving Party to  
5 whom disclosure is reasonably necessary for this litigation and who have signed the  
6 "Acknowledgment and Agreement to Be Bound" (Exhibit A);

7 (c) Experts (as defined in this Order) of the Receiving Party to whom disclosure is  
8 reasonably necessary for this litigation and who have signed the "Acknowledgment and  
9 Agreement to Be Bound" (Exhibit A);

10 (d) the Court and its personnel, pursuant to Section 14.3;

11 (e) court reporters and their staff, professional jury or trial consultants, and  
12 Professional Vendors to whom disclosure is reasonably necessary for this litigation;

13 (f) the author or recipient of a document containing the information or a custodian or  
14 other person who otherwise possessed or knew the information, and any current or former  
15 employee of the Producing Party.

16 7.3 Disclosure of "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" and  
17 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY – SOURCE CODE" Information  
18 or Items: Unless otherwise ordered by the Court or permitted in writing by the Designating Party,  
19 a Receiving Party may disclose any information or item designated "HIGHLY CONFIDENTIAL  
20 – ATTORNEYS' EYES ONLY" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES  
21 ONLY – SOURCE CODE" only to:

22 (a) the Receiving Party's Outside Counsel of Record in this action, as well as  
23 employees of said Outside Counsel of Record to whom it is reasonably necessary to disclose the  
24 information for this litigation;

25 (b) Experts of the Receiving Party (1) to whom disclosure is reasonably necessary for  
26 this litigation, (2) who have signed the "Acknowledgment and Agreement to Be Bound" (Exhibit  
27 A), and (3) as to whom the procedures set forth in Section 7.4, below, have been followed;  
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- 1 (c) the Court and its personnel, pursuant to Section 14.3;
- 2 (d) court reporters and their staff, professional jury or trial consultants, and
- 3 Professional Vendors to whom disclosure is reasonably necessary for this litigation; and
- 4 (e) the author or recipient of a document containing the information or a custodian or
- 5 other person who otherwise possessed or knew the information, and any current or former
- 6 employee of the Producing Party.

7 7.4 Procedures for Approving or Objecting to Disclosure of “HIGHLY

8 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL –

9 ATTORNEYS’ EYES ONLY – SOURCE CODE” Information or Items to Experts.

10 (a) Unless otherwise ordered by the Court or agreed to in writing by the Designating

11 Party, a Party that seeks to disclose to an Expert (as defined in this Order) any information or item

12 that has been designated “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or

13 “HIGHLY CONFIDENTIAL– ATTORNEYS’ EYES ONLY – SOURCE CODE” pursuant to

14 Section 7.3 first must make a written request to the Designating Party that (a) sets forth the full

15 name of the Expert and the city and state of his or her primary residence, (b) attaches a copy of

16 the Expert’s current resume, (c) identifies the Expert’s current employer(s), (d) identifies each

17 person or entity from whom the Expert has received compensation or funding for work in his or

18 her areas of expertise or to whom the expert has provided professional services, including in

19 connection with a litigation, at any time during the preceding five years,<sup>1</sup> and (e) identifies (by

20 name and number of the case, filing date, and location of court) any litigation in connection with

21 which the Expert has offered expert testimony, including through a declaration, report, or

22 testimony at a deposition or trial, during the preceding five years.

23 (b) A Party that makes a request and provides the information specified in the

24 preceding respective paragraphs may disclose the subject Protected Material to the identified

25 \_\_\_\_\_

26 <sup>1</sup> If the Expert believes any of this information is subject to a confidentiality obligation to a third-

27 party, then the Expert should provide whatever information the Expert believes can be disclosed

28 without violating any confidentiality agreements, and the Party seeking to disclose to the Expert

shall be available to meet and confer with the Designating Party regarding any such engagement.

Expert unless, within 7 days of delivering the request, the Party receives a written objection from the Designating Party. Any such objection must set forth in detail the grounds on which it is based.

7.5 A Party that receives a timely written objection must meet and confer with the Designating Party (through direct voice to voice dialogue) to try to resolve the matter by agreement within seven days of the written objection. If no agreement is reached, the Party seeking to make the disclosure to Expert may file a motion as provided in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5, if applicable) seeking permission from the Court to do so. Any such motion must describe the circumstances with specificity, set forth in detail the reasons why the disclosure to Expert is reasonably necessary, assess the risk of harm that the disclosure would entail, and suggest any additional means that could be used to reduce that risk. In addition, any such motion must be accompanied by a competent declaration describing the parties' efforts to resolve the matter by agreement (i.e., the extent and the content of the meet and confer discussions) and setting forth the reasons advanced by the Designating Party for its refusal to approve the disclosure. In any such proceeding, the Party opposing disclosure to Expert shall bear the burden of proving that the risk of harm that the disclosure would entail (under the safeguards proposed) outweighs the Receiving Party's need to disclose the Protected Material to its Expert.

#### 8. SOURCE CODE

8.1 Source Code may be designated as "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY – SOURCE CODE" and shall be subject to all protections applicable to materials designated "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY," in addition to the following protections:

(a) If the production of Source Code is to occur in this litigation, after reasonable notice to the Receiving Party, a single electronic copy of any such Source Code shall be made available for inspection on a non-networked standalone computer at a mutually agreeable location and at mutually agreeable times during normal business hours, or Source Code shall be made

1 available in another form selected by the Producing Party that is at least as accessible as the  
2 standalone computer option described herein. The Receiving Party shall make any request to  
3 inspect the Producing Party's Source Code a reasonable time in advance of its desired inspection,  
4 and in no event less than two (2) court-days' notice, except as provided in subsection (c), below.  
5 Absent such reasonable notice, the Producing Party may decline to make its Source Code  
6 available to the Receiving Party for the requested inspection. The Source Code shall be made  
7 available in the same format as maintained in the normal course of business, and in a format  
8 allowing it to be reasonably reviewed and searched. The non-networked standalone computer  
9 shall be password protected and supplied by the Producing Party;

10 (b) The Receiving Party shall not copy or remove any portion of the Source Code.  
11 The Receiving Party's outside counsel and/or experts shall be entitled to take notes relating to the  
12 Source Code, either by handwriting or electronically (on a computer not connected to the  
13 Internet), but may not copy the Source Code into the notes. The Producing Party may visually  
14 monitor the activities of the Receiving Party's representatives during any Source Code review,  
15 but only to ensure that no unauthorized electronic records of the Source Code and no information  
16 concerning the Source Code are being created or transmitted in any way.

17 (c) Access to the standalone computer shall be permitted, after notice to the Producing  
18 Party and an opportunity to object, to Outside Counsel of Record representing the Receiving  
19 Party and three (3) Experts retained by the Receiving Party, the Experts having been approved  
20 under Section 7.4 of this Protective Order. The persons who will review Source Code on behalf  
21 of a Receiving Party shall be named in writing to the Producing Party at least five court days in  
22 advance of the first time that such person reviews such Source Code, and the Producing Party  
23 may object in writing within three court days of such notice. The parties shall thereafter meet and  
24 confer within three court days of any objection by the Producing Party to attempt to resolve the  
25 objection. If the Parties cannot resolve the objection without court intervention, the Parties will  
26 follow the procedures set forth in paragraph 2 of Magistrate Judge James' Standing Order re  
27 Discovery. In any such proceeding, the Producing Party shall bear the burden of proving that the  
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1 risk of harm that the access would entail outweighs the Receiving Party's need to allow its  
2 proposed Source Code reviewer access to the Source Code under the safeguards proposed;

3 (d) The Receiving Party may request that commercially-available software tools be  
4 installed on the standalone computer to assist the Receiving Party's review of the Source Code,  
5 provided, however, that (1) the Receiving Party possesses an appropriate license to such software  
6 tools; and (2) such software tools are reasonably necessary for the Receiving Party to perform its  
7 review of the Producing Party's Source Code consistent with all of the protections herein. The  
8 Receiving Party must provide the Producing Party with the CD or DVD (or links at which the  
9 Producing Party may access it) containing such licensed software tools at least ten (10) days in  
10 advance of the date upon which the Receiving Party wishes to have the software tool(s) available  
11 for use on the standalone computer. If the Parties are unable to agree on the additional requested  
12 software tools, they may seek an Order from the Court after making a good faith effort to resolve  
13 their dispute, pursuant to the protocol defined in paragraph 8.1(c), above;

14 (e) The Receiving Party may request paper copies of limited portions of Source Code  
15 that are reasonably necessary for the preparation of court filings, pleadings, expert reports, or  
16 other papers, or for deposition or trial, but shall not request paper copies for the purposes of  
17 reviewing the Source Code other than electronically as set forth in paragraph (a) in the first  
18 instance. A request for a paper copy comprising the following amounts of Source Code shall be  
19 presumed to be excessive, and the burden shall be on the Receiving Party to demonstrate the need  
20 for such requested paper copy: (1) an amount that would cause the Receiving Party to be in  
21 possession of more than three hundred (300) total pages of the Producing Party's Source Code; or  
22 (2) twenty (20) or more pages of a continuous block of Source Code. The Producing Party shall  
23 provide all such Source Code in paper form including bates numbers and the label "HIGHLY  
24 CONFIDENTIAL – ATTORNEYS' EYES ONLY – SOURCE CODE" within five court days of  
25 the Receiving Party's request, subject to subsection (g), below. The Producing Party may  
26 challenge the amount of Source Code requested in hard copy form pursuant to the dispute  
27 resolution procedure and timeframes set forth in Paragraph 6, above, whereby the Producing  
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1 Party is the “Challenging Party” and the Receiving Party is the “Designating Party” for purposes  
2 of dispute resolution.

3 (f) All access to the standalone Source Code computer shall be maintained by the  
4 Producing Party on a Source Code Access Log identifying, for each and every time any Source  
5 Code is viewed, accessed or analyzed: (1) the name of each person who accessed the code; (2) the  
6 date and time (time in and time out) of access; (3) the length of time of access; and (4) the bates  
7 numbers of any copy of any paper (non-electronic) copies of any portion of the code that were  
8 produced;

9 (g) No electronic copies of Source Code shall be made without the agreement of the  
10 Producing Party or further order of the Court. No additional hard (non-electronic) copies of  
11 Source Code or portions of Source Code shall be made without the agreement of the Producing  
12 Party or further order of the Court. Notwithstanding the foregoing, nothing in this sub-Paragraph  
13 shall prevent a Party from making such additional hard copies of Source Code as are (1)  
14 necessary for use as exhibits at trial; (2) necessary to prepare court filings, pleadings, or other  
15 papers (including a testifying expert’s expert report), (3) necessary for deposition, or (4)  
16 otherwise necessary for the preparation of its case. Such papers shall be subject to the  
17 requirements of Section 14.3 herein, and all other protections applicable to materials designated  
18 HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY – SOURCE CODE;

19 (h) Within 60 days of final termination of the suit as to the Producing Party, the  
20 Receiving Party shall return all hard (non-electronic) copies of Source Code or certify through  
21 counsel with personal knowledge that all such copies have been destroyed.

22 9. PROSECUTION BAR

23 9.1 Absent written consent from the Producing Party, any individual who receives  
24 access to information or items designated by the Producing Party as “HIGHLY CONFIDENTIAL  
25 – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES  
26 ONLY – SOURCE CODE” shall not be involved in the prosecution of patents or patent  
27 applications relating to computer security, network security, and/or cyber security, including  
28 without limitation the patents asserted in this action and any patent or application claiming



1 priority to or otherwise related to the patents asserted in this action, before any foreign or  
2 domestic agency, including the United States Patent and Trademark Office (“the Patent Office”).

3 9.2 For purposes of this paragraph, “prosecution” includes: directly or indirectly  
4 drafting, amending, advising, or otherwise affecting the scope or maintenance of patent claims.  
5 To avoid any doubt, “prosecution” as used in this paragraph does not include representing a party  
6 challenging a patent before a domestic or foreign agency or defending against such a challenge  
7 (including, but not limited to, a reissue protest, *ex parte* reexamination, *inter partes* review, or  
8 *inter partes* reexamination).

9 9.3 No prohibition set forth in this paragraph shall apply to or result from any  
10 Protected Materials that such individual had lawfully received or authored prior to and apart from  
11 this litigation, or to any other material not covered by this Protective Order.

12 9.4 The restriction of Section 9.1 shall begin when access to “HIGHLY  
13 CONFIDENTIAL – ATTORNEYS’ EYES ONLY” or “HIGHLY CONFIDENTIAL –  
14 ATTORNEYS’ EYES ONLY – SOURCE CODE” information or items is first received by the  
15 affected individual and shall end four (4) years from the date this Order is entered by the Court or  
16 two (2) years after final termination of this action, whichever is longer.

17 9.5 Receipt by House Counsel of Protected Material that is: (1) non-technical in nature  
18 (*e.g.*, financial or license information), or (2) filed with the Court, under seal, in the body (*e.g.*,  
19 not as an exhibit) of legal brief, pleading or other submission, shall not trigger the restrictions of  
20 Section 9.1.

21 10. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN OTHER  
22 LITIGATION

23 10.1 If a Party is served with a subpoena or a court order issued in other litigation that  
24 compels disclosure of any information or items designated in this action as “CONFIDENTIAL,”  
25 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL  
26 – ATTORNEYS’ EYES ONLY – SOURCE CODE,” that Party must:

27 (a) promptly notify in writing the Designating Party. Such notification shall include a  
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1 copy of the subpoena or court order;

2 (b) promptly notify in writing the party who caused the subpoena or order to issue in  
3 the other litigation that some or all of the material covered by the subpoena or order is subject to  
4 this Protective Order. Such notification shall include a copy of this Protective Order; and

5 (c) cooperate with respect to all reasonable procedures sought to be pursued by the  
6 Designating Party whose Protected Material may be affected.

7 10.2 If the Designating Party timely seeks a protective order, the Party served with the  
8 subpoena or court order shall not produce any information designated in this action as  
9 “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.” or  
10 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY – SOURCE CODE” before a  
11 determination by the court from which the subpoena or order issued, unless the Party has obtained  
12 the Designating Party’s permission. The Designating Party shall bear the burden and expense of  
13 seeking protection in that court of its confidential material – and nothing in these provisions  
14 should be construed as authorizing or encouraging a Receiving Party in this action to disobey a  
15 lawful directive from another court.

16 11. A NON-PARTY’S PROTECTED MATERIAL SOUGHT TO BE PRODUCED IN THIS  
17 LITIGATION

18 (a) The terms of this Order are applicable to information produced by a Non-Party in  
19 this action and designated as “CONFIDENTIAL,” “HIGHLY CONFIDENTIAL –  
20 ATTORNEYS’ EYES ONLY,” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY  
21 – SOURCE CODE.” Such information produced by Non-Parties in connection with this  
22 litigation is protected by the remedies and relief provided by this Order. Nothing in these  
23 provisions should be construed as prohibiting a Non-Party from seeking additional protections.

24 (b) In the event that a Party is required, by a valid discovery request, to produce a  
25 Non-Party’s confidential information in its possession, and the Party is subject to an agreement  
26 with the Non-Party not to produce the Non-Party’s confidential information, then the Party shall:

27 (i) promptly notify in writing the Requesting Party and the Non-Party that some or all  
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1 of the information requested is subject to a confidentiality agreement with a Non-Party;

2 (ii) promptly provide the Non-Party with a copy of the Protective Order in this  
3 litigation, the relevant discovery request(s), and a reasonably specific description of the  
4 information requested; and

5 (iii) make the information requested available for inspection by the Non-Party.

6 (c) If the Non-Party fails to object or seek a protective order from this Court within 14  
7 days of receiving the notice and accompanying information, the Receiving Party may produce the  
8 Non-Party's confidential information responsive to the discovery request. If the Non-Party timely  
9 seeks a protective order, the Receiving Party shall not produce any information in its possession  
10 or control that is subject to the confidentiality agreement with the Non-Party before a  
11 determination by the Court. Absent a court order to the contrary, the Non-Party shall bear the  
12 burden and expense of seeking protection in this Court of its Protected Material.

13 12. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL

14 12.1 If a Receiving Party learns that, by inadvertence or otherwise (including due to an  
15 incorrect designation pursuant to Section 5.3), it has disclosed Protected Material to any person or  
16 in any circumstance not authorized under this Protective Order, the Receiving Party must  
17 immediately (a) notify in writing the Designating Party of the unauthorized disclosures, (b) use its  
18 best efforts to retrieve all unauthorized copies of the Protected Material, (c) inform the person or  
19 persons to whom unauthorized disclosures were made of all the terms of this Order, and (d)  
20 request such person or persons to execute the "Acknowledgment and Agreement to Be Bound"  
21 that is attached hereto as Exhibit A.

22 13. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE PROTECTED  
23 MATERIAL

24 13.1 When a Producing Party gives notice to Receiving Parties that certain  
25 inadvertently produced material is subject to a claim of privilege or other protection, the  
26 obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure  
27 26(b)(5)(B). Any inadvertent production of privileged or otherwise protected material that  
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satisfies the Federal Rule of Evidence 502(b) shall not be deemed to have waived the privilege or protection. This provision is not intended to modify whatever procedure may be established in an e-discovery order that provides for production without prior privilege review.

14. MISCELLANEOUS

14.1 Right to Further Relief. Nothing in this Order abridges the right of any person to seek its modification by the Court in the future.

14.2 Right to Assert Other Objections. By stipulating to the entry of this Protective Order, no Party waives any right it otherwise would have to object to disclosing or producing any information or item on any ground not addressed in this Protective Order. Similarly, no Party waives any right to object on any ground to use in evidence of any of the material covered by this Protective Order.

14.3 Export Control. Disclosure of Protected Material shall be subject to all applicable laws and regulations relating to the export of technical data contained in such Protected Material, including the release of such technical data to foreign persons or nationals in the United States or elsewhere. The Producing Party shall be responsible for identifying any such controlled technical data, and the Receiving Party shall take measures necessary to ensure compliance.

14.4 Filing Protected Material. Without written permission from the Designating Party or a court order secured after appropriate notice to all interested persons, a Party may not file in the public record in this action any Protected Material. A Party that seeks to file under seal any Protected Material must comply with Civil Local Rule 79-5. Protected Material may only be filed under seal pursuant to a court order authorizing the sealing of the specific Protected Material at issue. Pursuant to Civil Local Rule 79-5, a sealing order will issue only upon a request establishing that the Protected Material at issue is privileged, protectable as a trade secret, or otherwise entitled to protection under the law. If a Receiving Party's request to file Protected Material under seal pursuant to Civil Local Rule 79-5(e) is denied by the Court, then the Receiving Party may file the Protected Material in the public record pursuant to Civil Local Rule 79-5(e)-(f) unless otherwise instructed by the Court.

1       15.     FINAL DISPOSITION

2           15.1    Within 60 days after the final disposition of this action, as defined in Section 4,  
3 each Receiving Party must return all Protected Material to the Producing Party or destroy such  
4 material. As used in this subdivision, “all Protected Material” includes all copies, abstracts,  
5 compilations, summaries, and any other format reproducing or capturing any of the Protected  
6 Material. Whether the Protected Material is returned or destroyed, the Receiving Party must  
7 submit a written certification to the Producing Party (and, if not the same person or entity, to the  
8 Designating Party) by the 60 day deadline that (1) identifies (by category, where appropriate) all  
9 the Protected Material that was returned or destroyed and (2) affirms that the Receiving Party has  
10 not retained any copies, abstracts, compilations, summaries or any other format reproducing or  
11 capturing any of the Protected Material. Notwithstanding this provision, Counsel are entitled to  
12 retain an archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts,  
13 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney work  
14 product, and consultant and expert work product, even if such materials contain Protected  
15 Material. Any such archival copies that contain or constitute Protected Material remain subject to  
16 this Protective Order as set forth in Section 4 (DURATION).

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18   IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.  
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2 DATED: March 13, 2018

Respectfully submitted,

By: /s/Austin Manes

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Attorneys for Plaintiff  
FINJAN, INC.

11  
12 DATED: March 13, 2018

Respectfully submitted,

By: /s/Oleg Elkhunovich

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**ATTESTATION**

In accordance with Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this document has been obtained from any other signatory to this document.

By: /s/ Austin Manes

PURSUANT TO STIPULATION, IT IS SO ORDERED.

DATED: March 13, 2018



\_\_\_\_\_  
United States Magistrate Judge  
The Honorable Maria-Elena James

1 EXHIBIT A

2 ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

3 I, \_\_\_\_\_ [print or type full name], of  
4 \_\_\_\_\_ [print or type full address], declare under  
5 penalty of perjury that I have read in its entirety and understand the Protective Order that was  
6 issued by the United States District Court for the Northern District of California, Oakland  
7 Division on \_\_\_\_\_ [date] in the case of FINJAN, INC. v. BITDEFENDER, ET. AL., N.D.  
8 Cal. Case No.: 4:17-cv-4790-HSG. I agree to comply with and to be bound by all the terms of  
9 this Protective Order, and I understand and acknowledge that failure to so comply could expose  
10 me to sanctions and punishment in the nature of contempt. I solemnly promise that I will not  
11 disclose in any manner any information or item that is subject to this Protective Order to any  
12 person or entity except in strict compliance with the provisions of this Order.

13 I further agree to submit to the jurisdiction of the United States District Court for  
14 the Northern District of California for the purpose of enforcing the terms of this Protective Order,  
15 even if such enforcement proceedings occur after termination of this action.

16 I hereby appoint \_\_\_\_\_ [print or type full name] of  
17 \_\_\_\_\_ [print or type full address and telephone  
18 number] as my California agent for service of process in connection with this action or any  
19 proceedings related to enforcement of this Protective Order.

20  
21 Date: \_\_\_\_\_

22 City and State where sworn and signed: \_\_\_\_\_

23 Printed name: \_\_\_\_\_

24 [printed name]

25 Signature: \_\_\_\_\_

26 [signature]